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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

No. 860

LILLIAN SCHLOTHAN, *Petitioner*,

v.

TERRITORY OF ALASKA, *Respondent*.

TERRITORY OF ALASKA, *Petitioner*,

v.

LILLIAN SCHLOTHAN, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

## BRIEF FOR RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

1. The opinion of the United States District Court for the District of Alaska, Division Number One at Ketchikan is set forth in Appendix I of the Petition.

2. The opinion of the United States Court of Appeals for the Ninth Circuit entered February 9, 1960, is set forth in Appendix II of the Petition.

3. The judgment of the United States Court of Appeals, Ninth Circuit, entered the 9th day of February, 1960, is set forth in Appendix III of the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTIONS PRESENTED

The question is adequately set forth in the Petition.

## STATEMENT OF THE CASE

Early in 1951 Sigmund Einstoss entered into negotiations leading to the purchase of certain tideland property and the improvements thereon from Lillian Schlothan. At the time Einstoss was engaged in the fishing and canning business, including the operation of a salmon cannery, and needed additional space for storage and warehouse purposes. Schlothan was aware of the cannery operations of Einstoss. On June 19, 1951 petitioner executed a quit claim deed to the property, taking a purchase money mortgage as security for the payment of the balance due under the terms and conditions of sale.

After the acquisition of the Schlothan property Einstoss secured cannery equipment and used the buildings thereon for cannery purposes as well as using the property for storage and warehouse purposes. During 1951 Einstoss canned salmon on the property.

On November 2, 1953 the Territory of Alaska filed a notice of tax lien in the Office of the Recorder for the Precinct of Ketchikan where this property is located. The Alaska lien is based on the provisions of the commercial fisheries license tax provided for in Chapter

82, Section 4(h), Session Laws of Alaska, 1949, as amended by Chapter 113, Session Laws of Alaska, 1951.

Einstoss defaulted in the terms of his mortgage and on March 29, 1954, proceedings were instituted to foreclose the mortgage. Alaska was joined in the foreclosure proceeding because of its claimed interest in the property by virtue of its tax lien. The lien, notice of which was recorded November 2, 1953, was for taxes accruing in the years 1950 and 1951 in the total amount of $59,582.92, plus penalties and interest. Alaska filed a cross claim against Einstoss for this amount and prayed for enforcement of its lien. Alaska also sought a decree foreclosing its lien and a declaration that its lien was prior and superior to any right, title, or interest of Lillian Schlothan in the property.

On December 13, 1956 the trial court entered a judgment in favor of Lillian Schlothan against Einstoss in the sum of $14,800.12, and costs. It was further provided that the relative priority of the Schlothan lien and the Alaska lien would be subsequently determined by the court.

On January 25, 1957 a stipulation of facts pertinent to the question of lien priorities was filed. On the same day Alaska's motion for summary judgment filed on November 26, 1956 was argued. On June 21, 1957 the trial court handed down an unreported written opinion (Appendix I of Petition.) It was held that the lien for taxes which became due *after* Einstoss acquired the Schlothan property had priority over the purchase money mortgage. It was further held that the purchase money mortgage had priority over the lien for 1950 taxes which became due before Einstoss ac-

quired this property. On October 31, 1957, a judgment was entered effectuating the decision announced in this opinion.

Lillian Schlothan appealed from that part of the trial court's judgment which subordinated her mortgage to the tax lien for 1951 taxes. A cross appeal was filed by Alaska from that part of the judgment which subordinated Alaska's lien for 1950 taxes to the Schlothan mortgage.

On February 9, 1960 the United States Circuit Court of Appeals for the Ninth Circuit handed down its decision affirming that part of the decision of the lower court which held that Alaska's lien for 1951 taxes was superior to the Schlothan mortgage. Since the lien for 1951 taxes far exceeded the value of the property, the court held that Alaska was not aggrieved by the trial court's judgment with respect to 1950 taxes and dismissed Alaska's cross appeal.

## ARGUMENT

### I. The statute does not violate the due process clauses of the United States Constitution

The petitioner asserts that Chapter 82, Session Laws of Alaska 1949, violates the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

(a) The first contention set forth by petitioner is that the statute fails to provide the petitioner with notice of a lien. This contention is erroneous in that it fails to recognize the well established principle that the statute itself is constructive notice. This principle was aptly stated in the opinion of the trial court as follows:

"It is well established that the statute itself is constructive notice of the rights and obligations which it confers.

"In *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 243, (1944), the court held:

'All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes. *Reetz* v. *Michigan*, 188 U.S. 505, 509; *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 283. Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting land owners are familiar examples. *Huling* v. *Kaw Valley Co.*, 130 U.S. 559, 563-564; *Ballard* v. *Hunter*, 204 U.S. 241, 254-257, 262.'" (Page 12, Appendix I of Petition)

(b) The petitioner next argues that the statute is unconstitutional in that it permits the public to be deceived into believing that the prior years' tax has been paid by the issuance of a license.

Section 2 of Chapter 82, Session Laws of Alaska, 1949, provides in part:

"Upon the receipt of the application in proper form accompanied by the initial fee, the Tax Commissioner *shall* issue the license as of the date the application is filed or mailed, and the applicant may carry on the business from and after the date the application was actually made." (Emphasis added) (Page 33, Appendix IV of Petition)

Payment of the prior years' taxes is not made a prerequisite to the issuance of a license but on the contrary the statute expressly provides that the applicant may carry on the business from the date the application is

made. Thus, contrary to petitioner's assertion, the statute is not misleading and does not provide any basis for an assumption that the prior years' taxes have been paid when a new license is issued.

In the instant case Lillian Schlothan dealt with Einstoss on June 19, 1951. Taxes for the year 1951 were not due until January 15, 1952. Since the judgment was limited to the 1951 taxes, penalties, and interests, petitioner is not aggrieved by the judgment even if petitioner had erroneously assumed that taxes prior to 1951 had been paid previous to the issuance of the license for 1951. (Page 29, Appendix II of Petition).

(c) Petitioner next argues that the statute is so unreasonable as to constitute an affront to justice and seeks to distinguish the instant case from this court's holding in *International Harvester Credit Corp.* v. *Goodrich*, 350 U.S. 537.

In *International Harvester Credit Corp.* v. *Goodrich*, *supra*, this court upheld the validity of the New York lien statute which is similar in extent to Section 4(h) of Chapter 82, SLA 1949. The New York statute is set forth in the opinion of the trial court. (Page 9, Appendix I of Petition). In the *Goodrich case* this court recognized the necessity of the New York lien priority statute for the purpose of meeting a practical tax collecting problem, particularly where, as in the instant case, the tax cannot be computed or readily collected in advance. The necessity for the Alaska statute is clearly shown in the opinion of the United States Court of Appeals, which states as follows:

> "We take judicial notice of the great importance of the salmon canning industry in Alaska as compared to many other industries concerning which

territorial license tax liens may or may not have been provided for. Alaska here asserts and appellant does not deny that license taxes assessed against salmon carriers are difficult to collect because the business is seasonal, substantial taxes may accrue in a brief period, many canneries operate on very little capital, and the business is to a considerable extent itinerant.

"Thus essentially the same primary considerations which led the Supreme Court in International Haryester . . . to uphold the lien-priority statutes there in question are present here." (Page 24, Appendix II of Petition)

Petitioner seeks to distinguish the instant case from the *Goodrich case* upon the ground that no benefit seems to devolve upon Schlothan from the tax as would upon a truck manufacturer who depends upon the upkeep of the highways for his market. The necessity of such a benefit to the vendor was expressly rejected by this court in the *Goodrich case* at page 546 of the opinion.

"While it is not a condition of the validity of the State's lien, it is obvious that vendors of trucks, . . . derive substantial benefits from . . . maintenance of . . . highways . . ."

It is submitted that the validity of the Alaska statute is clearly shown by this court's opinion in the Goodrich case.

**II. The statute does not violate the equal protection of the law clauses of the United States Constitution**

(a) Petitioner contends that the Alaska lien statute is unconstitutional in that it denies equal protection of the laws to the petitioner. The reason advanced by petitioner in support of this contention is that the stat-

ute subjects contract encumbrancers or creditors dealing with persons engaged in the commercial fishing business to a prior lien for taxes, but does not subject other contract encumbrancers or creditors doing business with persons engaged in other industries in Alaska with similar burdens.

This argument of petitioner was aptly rejected by the United States Court of Appeals. After discussing the case of *State ex rel. Veatch* v. *Franklin*, 163 Ore. 500, 98, p. 2d 724, the court quoted from the Oregon decision as follows:

> "It is sufficient answer to these claims, assuming that a lien creditor has any standing to assert them, to say that legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited. *Savage* v. *Martin*, On., 91 P. 2d of 273, 287. The legislative discretion in such matters will not be disturbed by the courts unless the classification is plainly and manifestly arbitrary and without any reasonable basis. Here, the comparatively great importance in this state of the anadromous fish industry would justify the legislative decision to authorize a lien in the one case and not in the other. See 12 Am. Jur., 'Constitutional Law,' 164 § 485." (Page 26, Appendix II of Petition)

The United States Circuit Court of Appeals further stated "not only is this a sound statement of the controlling principle, but the factual considerations which led to rejection of the equal protection argument in that case are closely paralleled by the facts before us here." (Page 26, Appendix II of Petition).

The importance of the salmon canning industry and the well known difficulty encountered in collecting this

tax has prompted the legislature to make this classification. The United States Circuit Court of Appeals took judicial notice of the great importance of the salmon canning industry in Alaska as compared to other industries. The court also took judicial notice of the difficulties encountered in collecting the tax because the business is seasonal, substantial taxes may accrue in a brief period, many canneries operate on very little capital and the business is to a considerable extent itinerant. It is submitted that the classification is reasonable and that the United States Court of Appeals correctly disposed of this contention raised by the petitioner.

**III. The decision below is clearly correct and because of the unique fact situation presented would be of little importance to anyone other than the litigants**

The trial court's decision, which was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, is clearly within the holding of this court in *International Harvester Credit Corp.* v. *Goodrich, supra.* The petitioner has failed to disclose any decision by this court which would even suggest a contrary result.

In the instant case the taxes assessed for the year 1951 alone far exceeded the total value of the property. For this reason it was not necessary to decide the more difficult question dealing with the validity of a tax lien for taxes accrued prior to acquisition of the property by the taxpayer. In the instant case the petitioner not only had constructive knowledge of the tax lien but in addition had actual knowledge at the time of sale that the purchaser was engaged in the salmon canning business. Therefore, the importance of this decision is necessarily limited and would not answer more im-

portant questions which might arise in the event of subsequent litigation.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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